

No. 10,973

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN EDWARD YATES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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Subject Index

	Page
Jurisdictional Statement	1
Statement of the Case	2
Questions	11
Argument	11
1. The court did not err in refusing to give the requested instructions on simple assault	11
2. The court did not err in its communications to the jury	13
3. The judgment of conviction is not void or a nullity...	16
Conclusion	16

Table of Authorities Cited

Cases	Page
Ah Fook Chang v. United States, 91 F. (2d) 805.....	15
Chadwick v. U. S., 117 F. (2d) 902, cert. den. 61 S. Ct. 1109, 313 U. S. 585, 85 L. Ed. 1541.....	16
Dwyer v. U. S., 17 F. (2d) 696, cert. den. 47 S. Ct. 767, 274 U. S. 756, 71 L. Ed. 1336.....	15
Goode v. State, 152 So. 266.....	15
Gozner v. U. S., 9 F. (2d) 603.....	16
Grock v. U. S., 289 F. 544, 53 App. D. C. 146.....	16
Mattingly v. U. S., Fed. Cases No. 9295	16
Miller v. U. S. (C.C.A.-9), 4 F. (2d) 384.....	15
Outlaw v. U. S. (C.C.A. Tex.), 81 F. (2d) 805, cert. den. 56 S. Ct. 747, 298 U. S. 665, 80 L. Ed. 1389.....	15
People v. Moon (Cal.), 45 P. (2d) 384.....	13
People v. Morales, 60 Cal. App. 196.....	15
Phillips v. U. S., 264 F. 657, cert. den. 40 S. Ct. 584, 253 U. S. 491, 64 L. Ed. 1028.....	16
Rumley v. U. S., 293 F. 532.....	15
State v. Coffman (Or.), 136 P. (2d) 687.....	13
State v. Estep, 24 P. 986, 44 Kan. 572.....	13
State v. Foley, 25 P. (2d) 565, 174 Wash. 575.....	13
State v. Gonzales (Wyo.), 23 P. (2d) 354.....	13
State v. Haines, 15 S. E. 555	15
State v. McDonald, 149 P. 279, 51 Mont. 1.....	13
State v. McGowan, 93 P. 552, 36 Mont. 422.....	13
State v. McPhail, 81 P. 683, 39 Wash. 199.....	13
State v. Mowry, 15 P. 282, 37 Kan. 369.....	13
U. S. v. McGuire, 64 F. (2d) 485, cert. den. 54 S. Ct. 63, 290 U. S. 645, 78 L. Ed. 560.....	15
U. S. v. Walsh, 22 F. 644	16
Valdez v. U. S., 244 U. S. 432	15

Codes

United States Code:

Title 18, Section 455	1
Title 28, Section 41, subdivision 2	2
Title 28, Section 225, subdivisions (a) and (b).....	2

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JURISDICTIONAL STATEMENT.

This is an appeal from the judgment of conviction (Tr. 10-11) of the District Court of the United States for the Northern District of California, Southern Division, convicting the appellant, after a jury trial, of violation of Title 18, United States Code, Section 455. The indictment alleged that on board an American vessel on waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state of the United States the appellant assaulted one Henry Frederick Olsen, with a knife, with malice aforethought and with intent to kill the said Olsen (Tr. 2). The appellant was found guilty of the lesser included offense of assault with a deadly weapon (Tr. 9).

The Court below had jurisdiction under the provisions of Title 28, United States Code, Section 41, subdivision 2. The jurisdiction of this Honorable Court is invoked under the provisions of Title 28, United States Code, Section 225, subdivision (a) and subdivision (b).

STATEMENT OF THE CASE.

On February 4, 1944 the S.S. "President Johnson", an armed American transport, was at anchor in Purvis Bay, Florida Island, Solomon Islands Group. The first American port at which the vessel touched subsequent to that date was San Francisco, California (Tr. 25-26).

The appellant John Edward Yates, and one Henry Frederick Olsen, were members of the crew of the vessel on the voyage in question. Olsen, a Petty Officer, was rated as a Boatswain or foreman of the sailors and Yates was a messman, or waiter, in the Petty Officers' mess. Olsen was superior in rank to Yates but was not his superior officer, as Olsen was in charge of the sailors and had no connection with the steward's department of which Yates was an employee (Tr. 25-26).

At about 7:40 A.M. on the morning of February 4, 1944, Olsen first saw the appellant in the mess room where the appellant was waiting on table, serving about fifteen men. Olsen sat at one of the two tables and, after waiting about five or ten minutes without being served, asked the appellant where the other

messman was as he had not been waited on. The appellant said "it don't concern me" (Tr. 27-28) and, after some discussion, Olsen reported the matter to the Third Steward. Thereafter, Olsen was served by the appellant, Olsen claiming that the latter "threw it in front of me on the table" (Tr. 28).

Olsen stated that he got up from the table with the intention of hitting Yates, but that he did not do so. A scuffle ensued and the two men wrestled out of the room and into the alleyway but no blows were struck and, after some discussion, Olsen went back and ate his breakfast (Tr. 27-29).

After finishing his breakfast about five minutes later, Olsen left the mess hall and engaged in a conversation with the Third Steward, one William A. Collins, in the passageway outside near a stairway, at a point about five feet from the entrance to the mess hall where the passageway is about five or six feet wide. Olsen was leaning on a rail with his back to the mess hall; the Third Steward was standing by his side (Tr. 29).

The next thing Olsen remembers is being stabbed by the appellant. In this connection Olsen testified (Tr. 30-31):

"A. As I was standing there I felt a stab in the right side of my back and also in my arm, and I looked around, and I saw Yates standing there with a kind of a pointed-looking knife in his hand.

Q. You were talking, as you say, and the first thing you noticed—did you hear anything said before you felt this stab in your side?

A. No.

Q. Where was this stab in the side?

A. It was in the right side.

Q. Right side?

A. Yes.

Q. Where, in relation to the front or back of your body?

A. It was in the back of my body.

Q. You say you felt this stab?

A. Yes.

Q. What was the next thing that you did?

A. Well, I turned around so quickly that I squirmed my body something like this, and I looked around, and I saw Yates standing there with this knife. That is all I remember, I run like everything. The knife was a pointed-looking knife, from what I saw of it, I didn't see much of it; it had a blue blade, I couldn't tell you for sure how long the blade was, but approximately it was on or about ten inches—I would say ten or twelve inches. I couldn't say for sure if it was sharp on both sides or pointed, because I just saw it a mere glimpse, and I ran as fast as I could upstairs. I did not hear anything said. I went to the ship's hospital for first aid.

Q. Do you recall whether or not you were stabbed in any other place?

A. It went in my back and three times in my arm.

Q. The first wound you remember was in the back?

A. Yes.

Q. Then you say you squirmed around. Did you turn facing Yates then?

A. Only part ways, my side was toward him.

Q. Do you remember being stabbed in the arm three times?

A. No, I don't remember that, even, it all happened so quickly that I only (31) remember this stab in my back. That is all I do remember. I went immediately to the hospital and remained there about eleven days. I returned to work about March 4th, but I couldn't fulfill the duties at the present time as a boatswain or a seaman. I never had any trouble with Mr. Yates previous to this affair, never any arguments or fights. I have been on the vessel about a year and two months; Yates was on the vessel only for the last trip." (Tr. 30-31.)

Olsen's description of the occurrence was unshaken on cross-examination (Tr. 31-39).

WILLIAM A. COLLINS, the Third Steward, corroborated the testimony of Olsen in every detail. His description of the affray is, in part, as follows (Tr. 38-42):

"I first saw Olsen on that morning when he came to me and told me that the service in the mess room was rather slow, and I told him to go back and sit down and I would see he got his breakfast. At this time I was in the passageway between the mess room and the galley. Olsen went back to the mess room. Yates was then in the mess room. I next saw Olsen and Yates when they came out of the mess room together, scuffling; they were locked together, wrestling. I saw no blows struck by either party. They broke up voluntarily. The only thing I heard them say at

that time is, Yates said to Olsen 'What is the matter with you?', and Olsen said 'What is the matter with you?'. They both broke up right after that. Olsen went back into the mess room and sat down to eat his breakfast, and Yates went back to work in the mess room. I observed Yates at that time and I did not see any cuts or bleeding on him. Yates was wearing an upper, and I noticed after they had broken away that it was torn. The next time that I saw Olsen was after he finished breakfast; about five minutes elapsed from the time I saw them break up and Olsen came out. Mr. Olsen came out of the mess room and came over to me and started to talk to me; his left side was toward the mess room door; we were facing each other.

Q. What was the next thing that took place after that while you were standing there talking?

A. Yates came out of the mess room with a knife and stabbed Olsen with it. (37)

Q. You say Yates came out of the mess room?

A. Yes.

Q. So that at this time, to the best of your recollection, you were facing up in this direction and Olsen facing toward you?

A. Yes.

Q. With his left side toward the door?

A. Yes.

Q. And Yates came out of the door?

A. That is right.

Q. Did you see or hear Yates say anything as he came out of the door?

A. He said something about, 'I will kill you, you son-of-a-bitch' or words to that effect. I didn't pay much attention to it.

Q. To the best of your recollection that is what he said?

A. That is right.

Q. Do you know whether or not at that time he had a knife in his hand?

A. Yes, he had.

Q. Did you see the knife?

A. Yes.

Q. Will you describe it for us?

A. I did not see it very plainly, but it looked like one of these knives they carry around the ships; nearly all of the crew and everybody carries them. It looked like it was about eight or nine inches in length, or something like that; I didn't measure it. I just saw it at a glance.

Q. Do you recall what the color of the blade was?

A. No, I do not.

Q. Do you know whether it was the type of knife that is sharpened on both sides?

A. Yes, it was.

Q. Do you know whether it was pointed or not?

A. Yes, it was.

Q. In other words, it was a sort of a sheath type, double-edged blade, about nine inches long?

A. Yes.

Q. You are in charge of the mess room, are you not?

A. Yes.

Q. You are familiar with the type of knives that they have in there to clean crumbs off the table?

A. Yes (38).

Q. Did the mess men, in their occupation, use a similar knife to this?

A. No; they used ordinary table knives.

Q. Ordinary table knives; I presume sharp only on the one side?

A. Yes.

Q. Not pointed?

A. No, they are not pointed.

Q. Do you know, in your capacity as third steward, whether there is any use for this type of knife in Yates' possession in connection with his duty as a mess man?

A. No, there is not.

Q. Now, at that time, you saw Yates come out of the mess room, and then you saw him stab Olsen?

A. He must have stabbed him. Olsen left right after that, and there was blood dropping on the deck.

Q. Do you know how much time elapsed during this?

A. It was instantaneous; about five seconds.

Q. Did you or did you not see Olsen throw up his arms at any time?

A. I don't remember; I could not say.

Q. The next thing you know Olsen turned and ran, in what direction?

A. He ran what they call on the ship aft, toward his quarters.

Q. That would be down in this direction.

A. Yes.

Q. Down this way?

A. Yes.

Q. Did you have any conversation with Yates after Olsen ran away?

A. None whatsoever.

Q. You did not say anything to him?

A. No.

Q. Did you see what he did after that?

A. Yes; he went back in the mess room and went to work." (Tr. 38-42.)

His testimony was likewise unshaken on cross-examination (Tr. 42-45).

On redirect examination he stated that at the time he was stabbed Olsen was standing still and did not commence to run until after he was stabbed (Tr. 45).

ROLAND PICORD, junior engineer of the vessel, testified that he saw the affray in the passageway. He testified (Tr. 45-46):

"The only thing I saw was when Mr. Olsen put up his hand and hollered, 'No, you don't', and started running, and I happened to turn around, and I seen Mr. Yates over there put a knife into a sheath. Mr. Collins was there at that time. The first thing I heard was Mr. Olsen go up to Collins and say to Collins, 'It's getting so a person has to fight for his meals'. Yates was not there at that time; I first saw Yates when I heard Mr. Olsen holler, 'No you don't'. I was standing sideways; I was not facing them at all. I could just see the heads of Olsen and Yates at the time. The next thing I saw was Olsen running, and then I saw him put his knife in a sheath; I saw Mr. Yates put a knife in a sheath. I did not get a good look at it, to tell you the truth, I don't know whether it was a leather sheath; then I saw Olsen running off, I did not see where Yates went after that." (Tr. 45-46.)

The appellant claimed that in the first affray in the mess hall Olsen struck him and tore his shirt. That

he went to the fore-castle to change his shirt and as he was returning along the passageway saw Olsen and the Third Steward engaged in conversation. That he walked toward them and Olsen raised his hand at him (Tr. 50-51). That he had a plain knife out of the mess hall in his hand and that when Olsen raised his hand he "jabbed at him" (Tr. 53). That he only jabbed him once.

On cross-examination the appellant stated that he could not remember saying to Olsen as he walked toward him, "I'll kill you, you son-of-a-bitch" but that he would not say that he did not say it (Tr. 57).

JOHN R. DELORA, called for the defense, testified that he saw the affray in the passageway and that he saw the appellant jab only with a knife and that it was a common table knife (Tr. 60).

ROBERT A. BOLDOC testified that he was an officer of the United States Army assigned to the vessel and that he treated Olsen after the stabbing. He stated that Olsen had three incised wounds in the arm and one in the right chest wall. One wound was in the upper right arm just above the elbow on the under surface, one on the forearm on the upper surface just below the elbow, one near the wrist on the upper surface and one on the right chest wall underneath which was a bruise (Tr. 26-27).

QUESTIONS.

1. Did the Court err in not giving the requested instructions on simple assault?
 2. Did the Court err in its communications to the jury?
 3. Is the judgment of conviction void and a nullity?
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ARGUMENT.

1. THE COURT DID NOT ERR IN REFUSING TO GIVE THE REQUESTED INSTRUCTIONS ON SIMPLE ASSAULT.

The appellant's argument on this question is two-fold, first, that the evidence indicated that he acted in self-defense and, two, that as simple assault is an included offense in the statute under which he was charged, he was entitled as a matter of law to an instruction on simple assault.

The first argument is entirely without merit. Whether or not a defendant acts in self-defense has no bearing upon the degree of crime with which he may be charged under the statute or of which he may be found guilty. *If the appellant acted in self-defense he is not guilty of any crime at all.* The jury was fully instructed on the law of self-defense (Tr. 62-73) and determined as a matter of fact that he **had** not so acted. This finding cannot be attacked in this appeal as it is not contended that the evidence is **in**-sufficient to support the verdict.

The second argument is equally untenable. The statute under which the defendant was charged de-

scribes five distinct offenses, setting forth five degrees of crime which may arise from a single affray. These are (a) assault with intent to commit murder or rape, (b) assault with intent to commit any other felony, (c) assault with a deadly weapon with intent to do bodily harm, (d) battery, and (e) simple assault.

The appellant was charged in the indictment with assault with intent to kill and was found guilty of the lesser included offense of assault with a deadly weapon. The Court, after hearing the evidence, correctly refused to give instructions on the lesser offenses of battery and simple assault.

The facts show without contradiction, and the appellant himself admits, that he used a knife. A knife is a deadly weapon. It follows, therefore, that the only crimes under the statute of which the appellant could be guilty were assault with intent to kill or assault with a deadly weapon. The determining factor at this point was his intent. If it had been shown that he attacked Olsen with the knife with malice aforethought he would undoubtedly have been guilty of assault with intent to commit murder. The fact that the jury did not find such intent, does not change the factual situation that he did attack Olsen with a knife and that a knife is a deadly weapon. It became the duty of the Court, therefore, after having heard the evidence, to instruct the jury only upon the crimes of which he could have been found guilty, which it did.

Appellant's contention is unreasonable. If it was accepted it would follow that even in the most ag-

gravated case of assault with intent to kill by the use of a deadly weapon the Court would have to instruct the jury that the defendant could be guilty of merely a battery or even a simple assault. We respectfully submit that this is not the law.

People v. Moon (Cal.), 45 P. (2d) 384;
State v. Foley, 25 P. (2d) 565, 174 Wash. 575;
State v. Gonzales (Wyo.), 23 P. (2d) 354;
State v. Mowry, 15 P. 282, 37 Kan. 369;
State v. Estep, 24 P. 986, 44 Kan. 572;
State v. McGowan, 93 P. 552, 36 Mont. 422;
State v. McDonald, 149 P. 279, 51 Mont. 1;
State v. McPhail, 81 P. 683, 39 Wash. 199;
State v. Coffman (Or.), 136 P. (2d) 687.

2. THE COURT DID NOT ERR IN ITS COMMUNICATIONS TO THE JURY.

There were three written communications from the jury to the Court. The first of these was a request for the logbook of the vessel. The Court properly refused to send it to the jury for the reason that the entire logbook had not been introduced into evidence. It was introduced by the Government for the limited purpose of showing that the voyage took place (Tr. 25). Counsel for the appellant and for the Government were advised of this request and counsel for the appellant objected to the log being sent to the jury. Both counsel for the Government and the Court agreed that this objection was sound. Counsel for the appellant knew that the Court informed the jury that

their request was denied ("Tr. 88). It is immaterial whether or not appellant's counsel told the appellant of this ruling. It was not necessary that the appellant himself be present inasmuch as the Court had not given an instruction but merely a directive to the jury that certain evidence which they wished to consider was not admissible.

There can be no error in connection with the second communication inasmuch as it was a request for further instructions and the Court properly brought the jury into the courtroom and re-read the requested instructions. The appellant and his counsel were present in the courtroom when these instructions were given and no objection was made or exception taken ("Tr. 90). This was the orderly and proper procedure to be followed.

The third communication was not error. The jury had not made a request for further instructions on the law, and the Court gave no instructions. When the jury retired at the close of the case they were furnished with certain forms of verdict and they were properly instructed upon their use (Tr. 73). From the only evidence which is available in the record, it would appear that the jury asked the Court if they could return a verdict different from those with which they were supplied. The Court, having supplied them with proper verdicts in accordance with the evidence and the instructions, properly informed the jury that they must return a verdict upon the forms which were given to them. Here, again, this was not an instruction but a directive.

There is no contention that the bailiff, as the Court's messenger, gave the jury any information other than that. The verdicts which were given we must assume to have been proper in accordance with the evidence. The appellant apparently overlooks the fact that among the forms of verdict was a verdict of not guilty.

Outlaw v. U. S. (C.C.A. Tex.), 81 F. (2d) 805, cert. den. 56 S. Ct. 747, 298 U. S. 665, 80 L. Ed. 1389;

Dwyer v. U. S., 17 F. (2d) 696, cert. den. 47 S. Ct. 767, 274 U. S. 756, 71 L. Ed. 1336;

U. S. v. McGuire, 64 F. (2d) 485, cert. den. 54 S. Ct. 63, 290 U. S. 645, 78 L. Ed. 560;

Valdez v. U. S., 244 U. S. 432;

Rumley v. U. S., 293 F. 532;

State v. Haines, 15 S. E. 555;

Goode v. State, 152 So. 266.

We respectfully submit that nothing new or additional was submitted to the jury for its consideration and, even if the third communication, by the bailiff, was irregular, no harm was done to the defendant and he was not prejudiced.

See dissenting opinion of Justice Wilbur in *Ah Fook Chang v. United States*, 91 F. (2d) 805, also:

Miller v. U. S. (C.C.A.-9), 4 F. (2d) 384;

People v. Morales, 60 Cal. App. 196.

**3. THE JUDGMENT OF CONVICTION IS NOT VOID
OR A NULLITY.**

It is not essential that the formal words "as charged" be used in the verdict.

It is not essential that the verdict recite the intent of the defendant or that he acted without just cause or excuse.

U. S. v. Walsh, 22 F. 644;

Grock v. U. S., 289 F. 544, 53 App. D. C. 146;

Phillips v. U. S., 264 F. 657, cert. den. 40 S. Ct.

584, 253 U. S. 491, 64 L. Ed. 1028;

Gozner v. U. S., 9 F. (2d) 603;

Mattingly v. U. S., Fed. Cases No. 9295;

Chadwick v. U. S., 117 F. (2d) 902, cert. den.

61 S. Ct. 1109, 313 U. S. 585, 85 L. Ed. 1541.

CONCLUSION.

We respectfully submit that no prejudicial error was committed and that the judgment should be affirmed.

Dated, San Francisco,

September 26, 1945.

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